

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROGER FRENETTE	:	DETERMINATION
	:	DTA NO. 816715
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Period April 1994 through June 1995.	:	

Petitioner, Roger Frenette, 4 Darien Place, East Northport, New York 11731, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period April 1994 through June 1995.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veteran's Memorial Highway, Hauppauge, New York, on August 5, 1999 at 1:30 P.M., with all briefs to be submitted by January 12, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Stephen P. Silberling, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Classic Carpentry, Inc.

FINDINGS OF FACT

1. On October 14, 1997 the Division of Taxation (“Division”) issued to petitioner, Roger Frenette, five notices of deficiency¹ as follows:

<i>Notice Number</i>	<i>For Tax Periods</i>	<i>Penalty Assessed</i>
L-014224899	April 28, 1994 through June 30, 1994	\$15,101.69
L-014224903	July 7, 1994 through September 29, 1994	\$35,157.83
L-014224900	October 6, 1994 through December 29, 1994	\$21,790.86
L-014224902	January 1, 1995 through March 30, 1995	\$20,333.89
L-014224901	April 6, 1995 through June 29, 1995	\$13,794.47

Each notice stated that it was issued to petitioner pursuant to Tax Law § 685(g) as a responsible person or officer of Classic Carpentry, Inc. (“Classic”) “for a penalty in an amount equal to the tax not paid by” Classic. The taxes not paid by Classic were withholding taxes due pursuant to Tax Law §§ 674 and 675.

2. Testifying on behalf of petitioner at the hearing were Victoria Irene Kirschberg, a bookkeeper for Northwest Associates, Inc. (“Northwest”) from 1988 or 1989 until December of 1995; Anthony Mariani, the office manager of Northwest from the latter part of 1991 until April or May of 1996; Edward Ferris, a foreman and general foreman for Northwest from approximately September of 1991 until the end of 1995 or beginning of 1996; and, petitioner himself.

3. Classic was a construction company operating in metropolitan New York and Long Island. It was formed in 1994 by Ken and Frank Stubbolo, two brothers who were also

¹A sixth notice of deficiency, notice number L-014224904, was also listed on the petition filed in this matter. The Division explained at the hearing that this notice had been canceled and was therefore no longer at issue in these proceedings.

principals in Northwest. Northwest was not a union company and required a union company to complete construction contracts. The Stubbolos had previously operated a union company called Interborough. Interborough apparently ceased operations due to tax problems, problems with the unions and problems with other creditors. The Stubbolos approached petitioner and asked if he would be an officer of the new company, "Classic." Petitioner had worked for Northwest and for Interborough prior to becoming an officer of Classic. He knew the Stubbolos had problems with the unions, including financial problems such as failure to pay union benefits, and that they could not form Classic using their own names. Petitioner on the other hand had good relationships with the unions and knew that would be of help in operating the new company. Petitioner wanted Northwest to stay in business so that the union members could keep their jobs. Petitioner agreed to be an officer of Classic at the Stubbolos' request.

4. Classic employed only persons who actually worked on the construction jobs. It had no office employees, or even an office of its own. Classic utilized Northwest's office at 47 Mall Drive in Commack, together with a telephone answering service that was maintained in Classic's name and a mail service. With the exception of petitioner, Northwest's office personnel handled the administrative duties of Classic. Northwest's personnel would call for messages and would pick up the mail for Classic.

5. Petitioner was the only signatory listed on Classic's bank account. Petitioner was listed as the president of Classic on the account signature authorization card.

6. Petitioner would come to Northwest's office approximately once or twice a week. He would sign the payroll checks and certain checks for small expense items and union expenses. At least some of the checks signed by petitioner were blank checks.

7. Classic's payroll was completed by Paypro, an outside paid payroll service.

Approximately once a week the payroll would arrive at Northwest's office after having been prepared by Paypro. Ms. Kirschberg or Mr. Mariani would review the Paypro documents. The payroll checks would then be left on petitioner's desk located in Northwest's office and he would come to the office and sign them. Included in these checks were checks for Federal and State withholding taxes.

Upon signing the payroll checks petitioner would give them to Ms. Kirschberg or Mr. Mariani who in turn would provide them to the Stubbolos. Ms. Kirschberg recalls seeing the checks on Frank and Ken Stubbolo's desks after they were signed. She was aware that the checks for Federal and State withholding taxes were never cashed because she reconciled the bank statements.

8. At some point prior to June 1995, Ms. Kirschberg told Mr. Ferris that there was a problem with the payment of taxes. Mr. Ferris, being a friend of petitioner's, informed petitioner as to what Ms. Kirschberg had told him. Ms. Kirschberg did not want to tell petitioner directly as she had been instructed by the Stubbolos not to provide financial information to petitioner. Also, during this time period petitioner received a notification from the Internal Revenue Service ("IRS") that withholding taxes for Classic had not been paid. Once aware that withholding taxes were not paid, petitioner refused to sign any more checks for Classic. Classic ceased operations soon thereafter.

9. Petitioner provided certain documentation to the IRS to show that he was not responsible for the Federal withholding taxes of Classic, including affidavits submitted in this matter from Ms. Kirschberg, Mr. Mariani and Mr. Ferris. Petitioner received notification from the IRS that it would not take further action regarding the matters he appealed. There is no

specific holding in this communication as to the reason why no further action would be taken and no statement that the IRS had found petitioner not to be responsible for the withholding taxes of Classic.

10. Petitioner's main function in his employment with the Stubbolos appears to have been as a job superintendent whose duties involved supervising construction jobs. Petitioner did not hire or fire employees.

11. Petitioner's wages for the calendar year 1994, as evidenced by his W-2 forms, were \$22,429.54 from Interboro Interiors, Inc. and \$12,467.70 from Classic.

12. At some point during the audit period petitioner became aware that there were some financial problems with Classic because he heard employees discussing that their paychecks from Classic had been returned for insufficient funds.

13. Petitioner never asked to see the bank statements or any other financial information regarding Classic.

14. After the hearing petitioner submitted into evidence the affidavit of Jeffrey Lubert. Petitioner was allowed time to submit this affidavit because he had not seen the tax returns submitted into evidence by the Division prior to the hearing, and petitioner testified that the signature on those returns was not his. Mr. Lubert is a forensic document examiner and diplomat of the American Board of Forensic Document Examiners. He has a Masters of Forensic Science from George Washington University. He currently holds the title of Forensic Scientist II (Questioned Document) in the Suffolk County Crime Laboratory where he has been employed since 1984. From 1980 to 1984 he was a Staff Document Examiner - Forensic Scientist II for the Illinois State Police Crime Lab. Based on these qualifications Mr. Lubert is qualified as an expert witness in forensic document examination. Mr. Lubert compared known examples of petitioner's

signature, such as that on his passport, with certain State and Federal tax returns and a GMAC Lease Statement (a total of 13 documents). It was Mr. Luber's opinion that five of the documents examined were not signed by petitioner,² and that while poor photocopy quality precluded a definitive comparison on the other eight documents, numerous discrepancies were still noted between petitioner's signature and the signatures on the eight comparison documents. Furthermore, Mr. Luber concluded that it appeared all of the comparison documents were signed by the same person, with the exception of one signature on the GMAC Lease Statement,³ which he could not conclusively say was signed by the same person.

15. The GMAC lease Statement was not signed by petitioner. The signature was forged.

16. Petitioner did not sign tax returns on behalf of Classic. The signatures on the tax returns submitted into evidence by the Division were forgeries.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner argues that Frank and Ken Stubbolo were the responsible officers of Classic and that his only duty regarding Classic was the ministerial one of signing the paychecks, Federal and State withholding tax checks and certain other union expense checks. He also maintains that the IRS determined that he was not an officer of Classic. Furthermore, petitioner argues that he did not willfully fail to pay the withholding taxes due because he in fact signed the checks for the withholding taxes and thought those taxes were being paid. Petitioner argues that he conscientiously did what he was supposed to do and everything he could do to see that the taxes were paid.

²Those five documents were the GMAC Lease Statement, the Division's form CT-5 dated March 15, 1995, and three IRS forms 941 dated July 29, 1994, October 31, 1994 and January 31, 1995.

³There were three separate signatures on this document.

18. The Division argues first that petitioner was responsible for the payment of Classic's withholding tax in that petitioner was a corporate officer, signed checks on behalf of Classic, and was in fact the only person authorized to sign checks on behalf of Classic. It argues that petitioner's authority over the operations of the corporation is evidenced by the fact that once petitioner refused to sign any more checks Classic ceased to function. The Division also argues that petitioner signed tax returns on behalf of Classic which is further evidence of his responsibilities regarding taxes. The Division urges that the affidavit of Mr. Luber be given little weight since it was precluded from cross-examining the witness and because the administrative law judge was denied the opportunity to assess the credibility of the witness.

Second, the Division argues that petitioner's failure to pay tax was willful in that petitioner allowed his name to be used by the Stubbolos in establishing Classic, knowing that they had problems in the past. Furthermore, with this knowledge petitioner blindly signed checks each week without asking any questions or asking to see any financial documents. The Division contends that petitioner's assertion that he thought the taxes were being paid is doubtful under these circumstances. Finally, the Division argues that petitioner introduced no evidence that he was in any way prohibited from exercising his authority to see that the taxes were paid.

19. In his reply petitioner asserts that the case law on the issue of willfulness supports his position that since he did not know the taxes were not being paid his conduct cannot be willful. He reasserts his argument that since the IRS did not find him liable neither should New York State.

CONCLUSIONS OF LAW

A. Tax Law § 685(g) imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds.

Tax Law § 685(n) defines the term “person” as it is used in section 685(g) as follows:

the term person includes an individual, corporation or partnership or an officer or employee of any corporation . . . or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

The issue of whether a corporate officer is a person as defined by section 685(n) has been litigated many times (*e.g.*, *Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799; *Matter of MacLean v. State Tax Commn.*, 69 AD2d 951, 415 NYS2d 492, *affd* 49 NY2d 920, 428 NYS2d 675). The relevant factors to be considered are well defined and similar to those considered in the context of sales tax liability. They include the following: whether the individual signed the company’s tax returns, possessed the right to hire and fire employees, derived a substantial portion of income from the company’s activities, possessed a financial interest in the company and had the authority to pay the company’s obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272; *see also*, *Matter of McHugh v. State Tax Commn.*, *supra*; *Matter of MacLean v. State Tax Commn.*, *supra*). The person’s official duties in relationship to the company are also a pertinent area of inquiry (*Matter of Amengual v. State Tax Commn.*, *supra*).

B. The issue of whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Classic depends upon the factual situation (*see*, *Matter of MacLean v. State Tax Commn.*, *supra*). In this case petitioner’s presentation of the facts relies heavily upon the testimony of the witnesses in support of his case. Despite some differences between the witnesses’ affidavits and their testimony at hearing, the testimony of the witnesses was consistent for the most part. I find that petitioner’s testimony was credible since it was supported by the testimony of the other three witnesses. I find the testimony of Ms.

Kirschberg, Mr. Mariani and Mr. Ferris reliable and therefore credible. While all three of these witnesses appeared to have amicable relationships with petitioner, none of witnesses had anything to gain from either completing the original affidavits or testifying at hearing.

C. I find that petitioner was a “person” as defined by Tax Law § 685(n). It is true that petitioner did not have a financial interest in the company and did not hire or fire employees. I also find that petitioner did not sign the tax returns submitted into evidence in this matter as such signatures were forgeries. Petitioner’s expert witness concluded that at least some of the signatures on the returns were forgeries and the remainder were questionable at best. He also concluded that the signatures that were not petitioner’s were all made by the same person, with the exception of one signature. The affiant was qualified as an expert in the area of forensic handwriting, and while the Division did not have an opportunity to cross examine this witness⁴ the information in the affidavit nonetheless appears reliable. Furthermore, the testimony of petitioner, Ms. Kirschberg and Mr. Mariani regarding the forging of petitioner’s name on various documents, including checks and a General Motors lease, corroborates the expert’s affidavit. Therefore, I find that petitioner did not sign tax returns for Classic.

However, in contrast to these facts, petitioner was an officer of Classic by his own admission and on at least one document, the bank signatory card, held himself out to be the president of Classic. For the year 1994 petitioner received \$12,467.70 or approximately one third of his wage income from Classic.⁵ Furthermore, petitioner signed all of the payroll checks of Classic, including Federal and State withholding checks, and signed checks for certain other

⁴The Division was allowed time after receipt of petitioner’s evidence on this issue to respond with its own evidence which it chose not to do.

⁵Petitioner’s testimony that he did not believe he was paid by Classic is not unreasonable in that the Paypro documents submitted by petitioner do not indicate any paychecks made out in his name. However, petitioner’s W-2 forms for the year clearly indicate he was paid by Classic.

expenses. Accordingly petitioner's argument that he was not under a duty to file the required returns or pay withholding tax fails.

D. The conclusion that petitioner was under a duty to act for the corporation in collecting and paying over taxes does not automatically lead to a determination that his failure to do so was willful within the meaning of Tax Law § 685(g). In *Matter of Levin v. Gallman* (42 NY2d 32, 34, 396 NYS2d 623, 624), the Court of Appeals held that the test of willfulness is:

whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.* at 34, 396 NYS2d at 624-625).

The Tax Appeals Tribunal has stated that “[t]he essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else. . . . Mere negligence is not enough.” (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988.) Lack of actual knowledge that withholding taxes have not been remitted to the State may, under certain circumstances, support a finding that a corporate officer did not act consciously and voluntarily (*id.*). However, the failure to collect and pay over taxes can be willful, notwithstanding the lack of actual knowledge, if it is determined that one with a duty to act, recklessly disregarded that duty (*see, Matter of Capoccia v. State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

E. Based on the evidence in this record, I conclude that petitioner recklessly disregarded his duty to ensure that withholding taxes were collected and paid over to the State. It is clear that petitioner was unaware that the withholding taxes were not being paid. He assumed that once he signed the checks the checks were being forwarded to the appropriate taxing

authorities. It is equally as clear that the Stubbolos wanted it that way and never offered any financial information to petitioner. However, one with a duty to act for a corporation cannot avoid liability by failing to concern himself with whether or not taxes are being paid (*see, Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 186, 188). Petitioner knew at the time Classic was formed that his name was being used in forming the corporation because the Stubbolos could not form a corporation in their names, be it for union, tax or other credit problems. He let the Stubbolos use his name and hold him out as an officer of the corporation. At some point during the audit period he even became aware that some of Classic's employees were having problems cashing their payroll checks due to insufficient funds. Despite all of this information, petitioner stopped at the offices of Northwest once or twice a week and simply signed the Paypro checks that were given to him for the employees' wages and Federal and State withholding taxes. He also signed checks for union and other expenses and even signed some blank checks. Not once did petitioner request to look at any financial records of Classic.⁶ Under these circumstances petitioner had a duty to act and recklessly disregarded that duty. Therefore, petitioner's failure to take any action to ensure that the withholding taxes were paid amounts to a willful failure to pay the tax even though petitioner was not aware the taxes were not being paid at the time they were due.

F. Petitioner also argues that the failure of the IRS to find him liable for the Federal withholding taxes should at least be considered persuasive authority that he is not liable for the State withholding taxes. There is no evidence in the record to support a specific finding that the IRS determined petitioner was not a responsible person or that his conduct was not willful. A

⁶The testimony of petitioner's witnesses in support of the proposition that the Stubbolos would not have let petitioner look at financial information had he asked is not relevant since petitioner never asked to look at any financial records.

statement from the IRS that no further action would be taken is not proof of either. In any event pursuant to 20 NYCRR 159.4 the Division would not be required to follow such a Federal finding had one been made.

G. The petition of Roger Frenette is granted to the extent indicated in footnote one, but is in all other respects denied. Notice of deficiency notice number L-014224904 is canceled as indicated in footnote 1. Notices of determination notice numbers L-014224899, L-014224903, L-014224900, L-014224902 and L-014224901 dated October 14, 1997 are sustained.

DATED: Troy, New York
June 22, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE